been benefited as much as other streets by these roads? Can the roads claim that property has not been damaged by them, though it may sell for its old figure, when all the neighborhood east and west, north and south, has shown a much higher increase? Does not a restriction on the use of property necessarily entail some damage? Is it a fair criterion to say that a sale for $23,000 in an inflated currency in 1873 is higher than a sale for $20,000 in currency on a gold basis in 1890? All these interesting questions I will only hint at as showing what a field of inquiry we have now touched. They are still unsettled questions which I do not feel justified in more than alluding to.

This very hasty glance at the elevated railroad litigation in New York will have served the writer's purpose, if it has helped in any way to show that, no matter how novel may be a legal problem, and no matter how great may be the interest involved, as long as the United States possess honest courts and a well-trained bar there will be found a way to meet all new problems and to reach satisfactory results; a way to promote public enterprise without injuring the individual citizen. This is the real benefit of the Story decision. This is the real lesson that it teaches. These are the two golden rules of jurisprudence it enunciated: First, "*Sic utere tuo ut alienum non lædas;*" and the second is like unto it, "Private property shall not be taken for public purposes without compensation."

Edward A. Hibbard.

NEW YORK, April, 1890.

TAXATION OF PIPES IN PUBLIC STREETS.

AN interesting question of law, and one upon which the courts are in hopeless disagreement, arises when a tax is levied upon iron pipes laid by private parties in the public streets by permission of the local authorities. Common examples of such pipes are gas and water mains laid by private corporations.

The fundamental inquiry is as to the nature of the interest of the corporation in the mains after they have been laid. Four theories have been held by the courts.

I. In Tennessee it is held that the pipes remain the personal property of the company.[1]

II. In Iowa it is held that they are affixed to the land on which the main works or sources of supply are situated, and are taxable as real estate of the company in the town where that land lies, though they may run into another town.[2]

III. In Rhode Island it is held that they are affixed to an easement which the company possesses in the soil of the street, and are therefore real estate of the company where they lie.[3] They are taxed, then, not *as an easement* of such value, but as actual tangible real estate owned by the company as appurtenant to its easement.

IV. In England it is held that they are affixed to the soil, and are, therefore, real estate; but that they are only occupied, not owned, by the company.[4] This view is apparently held in New York also.[5]

To consider the less tenable views first, it seems clear that the theory of the Iowa court cannot be sustained; though it is supported, it is said, by the practice of the assessors in at least one other Western State. It seems to have at least three fatal flaws. First, it is opposed to the facts. The water-mains in that case were no more affixed to the water-works than to the street-hydrants or to the land of consumers; as, for instance, a bridge is equally affixed to each bank of the river. Secondly, it is opposed to every other decided case in which the subject is considered. Thirdly, it is opposed to common sense.

The Rhode Island case is based on a phrase of Lord Campbell in his decision in the Chelsea water-works case, so far as it is

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[1] Memphis Gas-Light Co. *v.* The State, 6 Coldw. 310.

[2] Appeal of The Des Moines Water Co., 48 Ia. 324.

[3] Providence Gas Co. *v.* Thurber, 2 R. I. 15.

[4] Compare King *v.* Brighton Gas-Light Co., 5 B. & C. 466, with Chelsea Water-works Co. *v.* Bowley, 17 Q. B. 358. In the former case the company was held to be an *occupier* of land in the parish through which its pipes ran, and, therefore, to be liable to the poor-rate. In the latter case the company was held to have no *interest* (*i. e.*, ownership) in the land through which the pipes ran, and, therefore, not to be liable to the land-tax. In the former case it was distinctly held that the pipes were not personal property, but were affixed to the soil; the contrary having been urged by the company's counsel. The effect of these two cases is, therefore, as stated in the text.

[5] People *v.* Assessors of Brooklyn, 39 N. Y. 81. The decision is, that the pipes were not affixed to any land of the company, and, therefore, not taxable to it as real estate *belonging to it.* The court seems to take it for granted that the pipes were real estate.

based on any authority; and this phrase really lends no aid to the Rhode Island decision. It is a novel idea, that a chattel can be so affixed to an easement as to become the real property of the owner of the easement. If, for instance, the owner of a right of way should affix stone steps to the land, would they not pass to the owner of the land? Could they be claimed as affixed to the right of way? There are other objections to the Rhode Island theory, but this seems conclusive.

It remains to consider whether the pipes are personal property. It seems to me that they clearly are not, and that the English and New York theory is preferable to that of Tennessee. The pipes are put in the ground to remain there, or to be removed only when they become worn out and it is necessary to replace them with other pipes. Suppose the licence of the company to use the streets were revoked, the company would clearly have no right, after that, to dig up its pipes. This is, to be sure, consistent with continued ownership by the company; but intention settles the question whether or not they become part of the realty, and the fact that the company can remove its pipes only with the concurrence of the authorities is important as indicating a probable intention that they shall remain in the soil.

In fact, when a worn-out pipe is replaced by a new one, the old iron is carried away by the company. But this is consistent with the theory that the pipe is part of the realty. Suppose a tenant chooses to repair a brick walk on the leased premises, putting in new bricks; would he not be entitled to the old ones? Could the landlord bring trover if he destroyed them? Much more should it be so here. The company having a right to do so enters the land and severs certain old iron from the soil; the iron becomes a new article of property, and may well go to the company.

Suppose, instead of laying pipes through the streets, a gas or water company should dig a tunnel, cementing the sides of it to prevent leakage. There can be no doubt that the cement would become part of the realty. Is there any difference when iron is used in place of cement for the same purpose? As iron pipe is it not *functus officio*, having become the wall of a tunnel, to be removed, if at all, not as iron pipe but as old junk?

This view, which is that of the English courts, seems to me the only one tenable. If it is correct, the remaining question is merely one of interpretation of the statute providing for taxation.

It is in the power of the Legislature to tax the company for the pipes. This may be done, as in New York, by a special provision making the pipes real estate of the company *for purposes of taxation*,[1] or as in Massachusetts, by taxing the value of the company's franchise, which is of course, in an indirect way, taxation of the pipes, since the value of the franchise includes the value of the pipes.[2] An expedient holding gas-pipes to be part of the machinery of manufacture[3] is questionable in point of fact; if in fact they were part of the machinery of the company, they might well be taxed to it as such, though the legal ownership were in another.

In the absence, however, of a special provision of the statutes, pipes in the public street should be taxed neither as the real estate nor as the personal property of the company that lays them.

Joseph H. Beale, Jr.

BOSTON, January, 1890.

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[1] Laws of 1881, c. 293.

[2] Dudley *v.* Jamaica Plain Aqueduct Corporation, 100 Mass. 183.

[3] Com. *v.* Lowell Gas-Light Co., 12 All. 75; Memphis Gas-Light Co. *v.* The State, 6 Coldw. 310.